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AUTHOR Pullin, Diana; Zirkel, Perry A.
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ABSTRACT

The widespread use of testing to make critical individual decisions concerning education or employment opportunities, coupled with growing vigilance by the handicapped community, may mean increased legal scrutiny regarding this type of testing. The measurement community is also aware of difficult, perhaps unresolvable psychometric problems associated with testing handicapped persons. The past decade has seen new federal and state statutes designed to ensure handicapped persons' free and equal access to education, employment, and public services and to afford legal sanctions against inappropriate discrimination. This paper reviews legal issues concerning the testing of handicapped students and employees in schools and colleges. Part I summarizes the major specialized sources of applicable statutory and administrative law, focusing on two federal laws: (1) Section 504 of the Rehabilitation Act of 1973, which provides a wide definition of handicap and includes numerous testing requirements in education and employment settings; and (2) the Education of the Handicapped Act (1970), which provides extensive testing requirements and procedural safeguards specific to elementary and secondary school students. Part II synthesizes relevant case law. The largest cluster of testing cases has focused on alleged racial discrimination in special education placements. Regarding minimum competency testing requirements for receiving a high school diploma, three relevant court decisions held that this practice is neither unconstitutional nor a violation of federal legislation. Relatively few suits have progressed through the courts, and the proportion of successful plaintiffs has been relatively low. The only safe prediction is that similar lawsuits will be forthcoming. Included are 83 endnotes and an author abstract. (MLH)

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TESTING THE HANDICAPPED: LEGISLATION, REGULATIONS AND LITIGATION*

by

Diana Pullin and Perry A. Zirkel**

The past decade has been marked with widespread and increasing use of paper and pencil examinations to make critical individual decisions concerning education or employment opportunities. This movement, coupled with increasing viligance on the part of the community of persons with handicapping conditions, may mean increased legal scrutiny of the use of tests to make educational and employment decisions about handicapped persons. Indeed, the measurement community is already experiencing a growing awareness of difficult, perhaps even irresolvable, psychometric problems associated with testing handicapped persons.

The past ten years have also seen the enactment of new federal and state stautory protections designed to ensure handicapped persons free and equal access to education, employment, and public services and to afford legal sanctions against inappropriate discrimination on the basis of handicapping condition. While not all of these statutes and their implementing administrative regulations contain specific provisions on testing, even the general requirements of these laws will influence practices and procedures for testing handicapped persons. In addition, the provisions of the equal protection clause of the federal

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**Diana Pullin, J.D., Ph.D., is Professor and Dean of the School of Education at Boston College. Perry Zirkel, LL.M., Ph.D., is University Professor of Education and Law at Lehigh University.

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and some state constitutions have been used to address assertions of discrimination in testing programs.

This paper provides an overview of legal issues concerning the testing of handicapped students and employees in elementary and secondary schools and in institutions of higher education. The first part of the paper summarizes the major specialized sources of applicable statutory and administrative law. The second part synthesizes the relevant case law.

I. Legislation and Regulations

Section 504 of the Rehabilitation Act of 1973

Under the provisions of the Rehabilitation Act of 1973,[1] the statutory prohibitions against discrimination first provided in the Civil Rights Act of 1964 were extended to include protections for handicapped persons.[2] The operant language of Section 504 of the 1973 Act is not lengthy, being limited to the following sentence:

> No otherwise qualified handicapped individual in the United States ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....

The protections of Section 504 were much more specifically defined in administrative regulations implementing the statute. Among the number of provisions contained in those regulations, several are pertinent here. The regulations define the protected class to include not only those who have traditional types of mental or physical impairments,[3] but also individuals who either have a record of such impairments or who are "regarded as having such an impairment."[4] This definition extends legal

protections regarding testing to a much wider class of persons than those persons covered under the most commonly used protection in the elementary and secondary school context, the Education for the Handicapped Act (EHA),[5] which will be discussed below. The legal protections of Section 504 apply, for example, not only to a student who was formerly appropriately in special education but also to a student who was once misclassified into special education because both have a record of a handicapping condition. Similarly, they apply, as another example, to persons such as AIDS carriers, who do not have a bona fide handicapping condition but who are treated as if they do. The potential number of persons covered by Section 504 is, therefore, potentially much larger than the group covered by the EHA. Further, while the EHA applies to students of elementary and secondary school ages, Section 504 applies to those students as well as postsecondary students and to employees and other persons served by federally funded programs and activities.

The protections of Section 504 are limited, however, to those who, in the language of the statute, are "otherwise qualified handicapped persons." The regulations define this phrase in several different ways according to the context in which the matter arises. In employment, a handicapped person is otherwise qualified if, with "reasonable accommodation," the person can perform the essential functions of the job in question.[6] For matters concerning public preschool, elementary/secondary, or adult education services, a handicapped person is otherwise qualified if s/he is of an age during which nonhandicapped persons are provided services or if s/he is of an age in which state law

or the federal EHA mandates the provision of services.[7] For postsecondary and vocational education services, a handicapped person is otherwise qualified if s/he meets the academic and technical standards for admission or participation in the program.[8] For all other services, a handicapped person is otherwise qualified if s/he meets the "essential eligibility requirements for the receipt of such services."[9]

Within the postsecondary context, the United States Supreme Court has interpreted the "otherwise qualified" language of Section 504 in Southeastern Community College v. Davis.[10] At issue in the case was the application to a program in registered nursing submitted by an experienced licensed practical nurse with a severe hearing loss. The applicant relied in large part on lip-reading to understand the communications of those with whom she interacted. The Supreme Court supported the community college's rejection of the applicant and denied her challenge under Section 504. Rejecting the applicant's argument that "otherwise qualified" means "except for," the Court concluded that this term refers instead to a person who is able to meet all of a program's requirements "in spite of" his handicap. Further, the Court concluded that educational institutions are generally required only to make reasonable, not substantial, modifications in their standards and programs to accommodate handicapped students.

The general nondiscrimination provisions of Section 504 are designed to bar treatment that denies opportunities for otherwise qualified handicapped persons that are not equal to that afforded to others or not as effective as those provided to others.[11] In separate sections applicable to the employment context, the regulations indicate

that the nondiscrimination provisions apply to such specific activities as hiring, promotion, rates of compensation, or job classifications, any of which might involve testing.[12] A section on employment criteria is specific to testing, requiring:

> [An employer covered by the Act] may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless: (1) the test score or other selection criterion, as used by the recipient is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out as many handicapped persons are not shown ... to be available.[13]

The regulations go on to require that each covered employer do the following:

> select and administer tests concerning employment as best to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).[14]

As for preschool, elementary, and secondary education, Section 504 regulatory provisions in large part track almost exactly the provisions of the regulations promulgated under the EHA, particularly concerning the right to appropriate education. Like the EHA, the Section 504 regulations require preplacement evaluations and set forth specific provisions concerning evaluations and the evaluation process. Among other specifications, the regulations require that:

> (1) [t]ests and other evaluation materials have been validated for the specific purpose for which

> they are used and are administered by trained personnel in conformance with the instructions provided by the producer;
>
> (2) [t]ests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and
>
> (3) [t]ests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting [the handicapping condition itself].[15]

Like the EHA regulations, the Section 504 regulations require the use of multiple sources of information about a student when decisions are made, full documentation of information, and decision-making by a team of knowledgeable persons.[16]

Within the context of postsecondary education, the Section 504 regulations contain provisions concerning admissions procedures, requiring that recipients of federal assistance:

> (1) [m]ay not apply limitations upon the number or proportion of handicapped persons who may be admitted;
>
> (2) [m]ay not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless (i) the test or criterion, as used by the recipient, has been validated[17] as a predictor of success in the education program or activity in question and (ii) alternate tests or criteria that have a less disproportionate, adverse effect are not shown ... to be available [and];
>
> (3) [s]hall assure ... that (i) admissions tests are selected and administered so as best to ensure that ... test results accurately reflect the applicant's

> aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's sensory, manual, or speaking impairment (except where those skills are the factors that the test purports to measure); (ii) admissions tests that are designed for persons with impaired sensory, manual or speaking skills are offered as often and in as timely a manner as are other admissions tests, and (iii) admissions tests are administered in facilities that, on the whole, are accessible to handicapped persons.[18]

A final provision of the regulations relevant to testing concerns course examinations in postsecondary education. For course exams or for any other procedures used to determine student's academic achievement, schools must ensure that students with sensory, manual, or speaking impairments have a fair opportunity to demonstrate their proficiency.[19]

Section 504 creates two enforcement mechanisms to address alleged violations of its protections. Administrative enforcement by the Office for Civil Rights in the U.S. Department of Education can result in the termination of federal financial aid to an institution. Alternatively, an individual can file a private action in federal court.[20]

The Education of the Handicapped Act

Unlike Section 504, which applies to the employment and higher education contexts generally, the EHA is specific to students in elementary/secondary education. The entitlement to a free and appropriate education for handicapped students in need of special education afforded in the EHA[21] includes specific protections concerning the testing of students to determine eligibility, to establish programming and placement, and to conduct periodic reviews of the appropriateness of the programs and services provided. Among the detailed regulatory provisions are those requiring publicly-funded

evaluations prior to initial placement into special education, periodic reevaluations at least every three years, and the use of evaluation information in formulating the individualized education programs (IEPs).[22] The IEP serves as the cornerstone for the protections of the EHA; evaluations and testing are the foundations upon which the cornerstone rests. The EHA and its implementing regulations recognize the importance of evaluations by providing detailed provisions for the process and the tools used.

Among the EHA's evaluation requirements are those that nondiscriminatory test materials be used and that testing be administered in a student's usual mode of communication or native language.[23] Tests or evaluation techniques must be validated for the purposes for which they are used and must be nondiscriminatory as to race, culture, and handicapping condition.[24] Finally, no single item of evaluation information can be dispositive of a special education decision, instead multifaceted evaluations must be employed.[25]

Despite these detailed provisions, very few of the several hundred federal court cases decided to date under the EHA have addressed evaluation or testing issues. The vast proportion of disputes over the definition of an appropriate education for an individual student have relied upon very general discussions of appropriateness in terms of a program's potential to "provide educational benefit," "promote educational progress," or avoid "substantial regression."[26]

II. Litigation

Despite the cumulative scope and specificity of Section 504, the EHA, and other sources, there has not been a great deal of litigation

specifically focused on the testing of handicapped persons in the educational context. Several of the court decisions that have been entered, however, are of critical significance to educators and measurement experts.[27] The operational focii of these court decisions are testing criteria in special education placements, competency testing for high school graduation, and testing requirements for employment.

Testing criteria in special education placements

Race-related cases. The largest cluster of testing cases has focused on alleged racial discrimination in special education placements. These special race-related cases vary from the well-publicized Larry P. litigation, which reached the federal appellate level, to little known administrative rulings by the Office of Civil Rights.

The race-related results of the Office of Civil Rights (OCR) "letters of findings," in response to individual complaints or regular compliance reviews, have been mixed. In a 1978 compliance review of a school district in Missouri, OCR ruled that the disproportionate enrollment of minority-group students in the district's educable mentally retarded (EMR) program violated both Title VI of the Civil Rights Act of 1964[28] as well as Section 504, because the minority-group students were not evaluated against students with similar cultural, social, and ethnic backgrounds.[29] The result was not quite the same for a later complaint against another school district in Missouri. In this 1982 case, OCR concluded that the district did not violate Title VI because minority students were evaluated similarly to nonminority

students, but that the district did violate Section 504 because it had not given concurrent aptitude and achievement tests in evaluating such students for EMR and learning disability (LD) classes.[30] In 1985, in two separate rulings, OCR found no violation of Section 504 in the racial results of the EMR placement criteria used by the Georgia Department of Education and an Alabama school district, respectively.[31] Finally, in a 1986 ruling, OCR found an Illinois school district's use of multiple formal and informal evaluation instruments for EMR placement of minority and nonminority students to generally comport with the requirements of Section 504 and Title VI.[32] The variety in these OCR outcomes appeared to be attributable more to differing levels of interpretation of the applicable regulations than to the factual peculiarities of each case. Further, judicial precedents did not play a major role in these rulings, perhaps due to their relative recency.

Early case law provided forwarnings as to potential placement problems in using standardized tests for identifying mentally retarded students in racially mixed settings.[33] The focus of these cases, however, was testing as part of desegregation, not as part of special education.

The single court case to date that has delved most deeply into the difficult issues of testing the handicapped is Larry P. v. Riles. This case was initially filed in federal court in 1971 by parents of six black elementary school children in San Francisco, challenging the constitutionality of the use of standardized IQ tests for placement of black children in EMR classes.[34] The district court certified the plaintiff class and granted their motion for a preliminary injunction.[35] The United States Court of Appeals for the Ninth Circuit affirmed.[36]

The result, as extended by the California State Board of Education, was a moratorium on all IQ testing of black students for EMR placements in the state. The trial began in 1977, after the plaintiffs filed amended complaints alleging violations of Title VI, the EHA, other federal statutes, the equal protection clauses of the United States and California constitutions, and several sections of the California Education Code.

The district court, rejecting the defendants' genetic and socioeconomic explanations for the disproportionate enrollment of blacks in EMR classes, found that the IQ tests had not been validated for the purpose of placing black students in EMR classes and that, although the state statutes had been revised to require a multifaceted assessment, IQ tests played a "determinative or pervasive" role in the placement process.[37] Finding the defendants guilty of intentional discrimination based upon the historical background of the tests and the practices and policies of the California Board of Education, the district court held that the use of IQ tests in the placement of black children in EMR classes violated Title VI, Section 504, the EHA, and the equal protection clauses of the federal and California constitutions.[38] The court issued a permanent injunction against the use of any standardized IQ tests for the identification or placement of black children into EMR classes without the prior approval of the judge.[39] Further, the court ordered the state authorities to monitor and eliminate disproportionate placement of black children in EMR classes.

In an opinion filed in January 1984, and amended in June 1986, the Ninth Circuit affirmed the injunction,[40] based on the nondiscrimination

requirements of Section 504 and the EHA[41] and based on the disparate impact analysis under Title VI.[42] However, the appellate court reversed the findings of constitutional violations, finding a lack of the prerequisite discriminatory intent under the federal equal protection clause as well as a lack of jurisdiction to adjudicate state constitutional claims. In September 1986, the parties asked for a modification of the district court's injunction. In response, the district court modified its earlier data collection, reporting, and monitoring requirements and, more substantively, included in its ban on IQ testing a directive that districts use alternative means of assessment, such as:

> assessment of the pupil's personal history and development, adaptive behavior, classroom performance, academic achievement, and evaluative instruments designed to point out specific information relative to a pupil's abilities and inabilities in specific skill areas.[43]

The court also identified several impermissible reasons for administering IQ tests to black students, including "to gain diagnostic information" and "to develop goals and objectives."[44]

In PASE v. Hannon,[45] a federal court in Illinois recognized but rejected the trial court finding in Larry P. that standardized IQ tests are racially and culturally biased. Although the opinion is interesting for its direct exposure and armchair analysis of the items and answers of the Stanford-Binet and Wechsler Intelligence Scale for Children, its legal weight is limited because, as a condition for withdrawing their appeal, the plaintiff-parents obtained a settlement that provided for a

Larry P.-type moratorium on IQ testing for EMR placement in the Chicago public schools.

Other courts also yielded limited outcomes. In Anderson v. Banks,[46] the district court found a violation of Sec. 504, but not the equal protection clause, in the classification procedures that resulted in a disproportionate placement of black students as mentally retarded; this issue, however, was only secondary and not raised in the further proceedings. In Lora v. Board of Education,[47] the litigation resulted in approved stipulations for nondiscriminatory standards and procedures, but the precedential value is not substantial.

More recently, the Eleventh Circuit addressed the issue of minority overrepresentation in EMR placements, specifically in a post-desegregation context.[48] One curious difference from the Larry P. litigation was that the Georgia plaintiffs requested a rigid cutoff on IQ scores to determine placement rather than arguing that tests should be entirely eliminated.[49] Additionally, the Georgia litigation included a challenge, not specific to handicapped students, to the use of ability grouping based upon academic achievement within regular classrooms. The federal district court found that ability grouping in regular education did not violate the federal constitution, Title VI, or the Equal Educational Opportunity Act, but that the special education placement practices violated the Section 504 regulations.[50] However, after the defendants filed a motion to amend the judgment in light of Smith v. Robinson,[51] which provided that the EHA was the exclusive avenue for remedying handicapped students' claims,[52] the district court issued a supplemental order holding that the plaintiffs could not maintain the

action under Section 504. On appeal, the Eleventh Circuit then issued its opinion, affirming the lower court's ruling regarding achievement grouping in regular classes because the grouping in this case was shown to remedy rather than maintain the consequences of prior segregation.[53] The appellate court similarly upheld the lower court's Title VI ruling regarding EMR assignments, rejecting the finding of a prima facie case of disproportionate impact because the court disagreed with the statistical presumptions behind the comparison[54] and the flexible application of IQ scores by the schools.[55]

The most recent effort to address these race-related issues, in a Florida case, was dismissed when the named plaintiffs failed to establish that they were adequate class representatives of the group of students they sought to represent.[56]

This case law concerning race-related special education placements is as notable for what is not covered as for what is covered. First, the judges deciding the cases did not mention, much less rely upon, the APA Standards[57] for benchmarks, or even guidance, in resolving the disputes before them. Second, there is not, other than in the trial court opinions in Larry P., a significant amount of discussion of such psychometric issues as validity and reliability.[58] It is not clear from the content of the opinions whether this results from the nature of the presentations made to judges by the parties to these cases or from judicial reluctance to delve into the area. Third, there is significant room for further litigation on the use of standardized testing to determine special (or regular) education placements of handicapped students.[59]

Non-race cases. Other adjudications and quasi-adjudications relative to testing for special education placements, did not have a racial dimension. For example, in compliance reviews in various parts of the country, OCR pointed to Section 504 violations in the noncustomized selection and administration of special education placement instruments to limited English proficiency students.[60] Other OCR rulings concerned the requirements under Section 504 regulations for linguistically appropriate testing,[61] for the use of a variety of evaluative sources,[62] and for specifically validated instruments.[63] OCR has also issued policy letters in response to individual inquiries about the evaluation requirements of the Section 504 and EHA regulations.[64] Again, as with the race-related administrative rulings, these OCR determinations have not been particularly weighty or conclusive in terms of doctrinal development. Their significance is largely practical, serving as reminders of the extensive regulations pursuant to the relevant statutes.

The court decisions dealing with nonracial aspects of special education placement evaluation have been largely peripheral to testing. In a New York case, the intermediate appellate court held that, for re-evaluation of a child who had an aversion to tests, the failure to prescribe evaluation tests having the least adverse impact on the child while enabling the multidisciplinary team to gather necessary information was arbitrary and capricious.[65] In another case, the school district, based on testing by its psychologists, evaluated the plaintiff-pupil as emotionally disturbed but the parents, based on independent testing and evaluation, asserted that he was learning

disabled. Citing the principles of federalism and academic abstention, the court deferred to the diagnosis and treatment prescribed by the school district.[66] Other cases have addressed the issue of parental consent for evaluation, generally interpreting it as a narrow requirement under state and federal law.[67]

Competency Testing for High School Graduation

Approximately half the states, and a number of local school districts in other states, require that students obtain a passing score on a minimum competency test in order to receive a regular high school diploma.[68] Prior to this testing requirement, there had always been considerable variation among states and districts in the graduation requirements imposed on handicapped students. Some schools afforded handicapped students an opportunity to receive regular high school diplomas based upon successful completion of a special education curriculum; some required successful completion of the regular curriculum in order to be eligible for a regular diploma; some always awarded handicapped students a special diploma or certificate of completion. In the early years of minimum competency testing to determine the award of diplomas, there was confusion over whether to allow or require the participation of handicapped students in these testing programs or whether to waive the testing requirement and award a regular diploma without the test. All of the various approaches present difficult legal and social policy issues about the role of handicapped persons in our educational and social structure.

Three court decisions have addressed the issue of participation of handicapped high school students in test-for-diploma programs. These

courts uniformly held that the use of minimum competency tests to determine the award of regular high school diplomas to students with handicaps is neither per se unconstitutional nor a per se violation of the federal statutes concerning education of the handicapped.[69] Additionally, students who would have otherwise met all of the previous requirements for the receipt of a regular high school diploma may be denied a diploma when a new testing requirement is implemented without creating violations of Section 504 so long as there are sufficient accommodations in the administration of the test.[70] However, there must be adequate advance notice to allow sufficient coverage of the skills and knowledge covered on the test in a handicapped student's IEP or for the parents and teachers to make an informed decision that the IEP not be geared to the test.[71]

As an ancillary matter, which is not limited to testing for graduation, the exclusion of handicapped students from district- or state-wide achievement testing in elementary or secondary education may give rise to legal disputes. In the only reported case to date, OCR found no violation of Section 504 where the exclusions were reached on an individualized basis and where appropriate alternative testing was available.[72]

Higher Education Admissions Testing

While there have been about 15,000 handicapped students who have taken the Scholastic Aptitude Test (SAT) in the past four years and a growing number of handicapped students who now seek access to higher education,[73] there have been no court decisions to date on the SAT, ACT or other postsecondary educational testing. In one administrative

ruling, OCR held that a school district violated Section 504 by failing to complete the administration of a modified (untimed) ACT to a learning disabled high school student.[74]

The College Board offers adapted forms of the SAT in four editions (regular, large-type, braille, and cassettes) and provides administrations under several special conditions, including extra time (up to 12 hours for the SAT), special equipment, a separate room, and use of a reader, an amanuensis, or an interpreter.[75] Where adapted instruments are not available or administered, Section 504 requirements come into play. For example, in a policy memorandum, OCR concluded that a law school had not violated Section 504 where it based the rejection of a visually impaired applicant based on not only his low scores on a presumably unmodified administration of the LSA but also other factors, including Wechsler Intelligence Test results that he submitted as offsetting evidence.[76]

Employment Testing

The considerable number of cases addressing issues of race discrimination in employment testing and the often highly sophisticated judicial analyses of psychometric issues in those cases has not been duplicated in the area of employment discrimination on the basis of handicap. Indeed, there have been only a few legal challenges to employment testing on behalf of handicapped workers. Although these cases have arisen in other employment contexts, they have direct applications to employment in the education sector.

In Stutts v. Freeman,[77] a Section 504 claim was brought against the Tennessee Valley Authority (TVA) by one of its employees seeking to

challenge denial of entry into an apprenticeship program for heavy equipment operators. The employee, an experienced laborer who had been employed by defendants for eight years, was denied entry into the apprenticeship program solely on the basis of a low score on the General Aptitude Test Battery (GATB), which was used by the TVA to predict probable success in the apprenticeship program. The employee was dyslexic and unable to read beyond the most elementary level. He apparently scored above average on nonverbal tests, but these results were not available to the TVA. Attempts to obtain a GATB score on the basis of an oral administration were refused by the Alabama State Employment Service (which presumably provided the examination service for the TVA) on the grounds that the GATB cannot be accurately administered under nonstandard, oral administration conditions. The Fifth Circuit Court of Appeals overturned a summary judgment for defendants, ruling that there existed a genuine issue of fact as to whether the plaintiff could successfully complete the training program. The court also ruled that the TVA's unsuccessful efforts did not amount to "reasonable accommodations" as required by the Section 504 regulations.[78] Citing Southeastern Community College, the court noted that the employer violated Section 504 in this case by denying the employee's transfer without implementing an alternate (oral) test or adjusting the entry requirements so as to not cause itself undue hardship.[79]

The Stutts decision suggests several interesting issues. First, the Fifth Circuit is quite clear in its holding that, as a matter of law under Section 504, reasonable accommodation must extend to the use of

multiple, alternate criteria for selection when the test employed does not offer a fair opportunity for a candidate to demonstrate his or her abilities. Second, the case was pursued through to a federal circuit court of appeals without the fact that there is an alternative test form, available since 1969, that can be easily identified in a widely available reference book on testing.[80] This case thus illustrates a perhaps not atypical lack of full judicial understanding and utilization of professional knowledge, even when it is available to meet the rigorous standards of antidiscrimination law.

A second recent Section 504 employment case, Crane v. Dole,[81] concerned the treatment afforded by the Federal Aviation Administration (FAA) to a hearing-impaired air traffic controller. The employee had worked for a period of years before he failed the required hearing test and was placed on involuntary, medical retirement. After the retired employee unsuccessfully sought employment in another section of the FAA that did not require a hearing test and after he exhausted internal administrative appeals, he filed suit. The court initially ordered the FAA to determine whether there was a reasonable accommodation that might be adopted so that the plaintiff could work in the position in which no hearing test was required and in which the only requirement concerning hearing acuity was that an employee, with or without a hearing aid or other reasonable accommodation, should be able to understand ordinary conversation.[82] The FAA then informally developed a test for the plaintiff in which he was read a list of individual pieces of information at a high speed and was expected to record them verbatim. The test was prepared by persons who had no experience in test

development, and there were no efforts to ascertain the validity, reliability, nor job-relevance of the test. The court then held that the FAA violated both Section 504 and the federal Administrative Procedures Act by "using a test for job performance which was not valid, which was not administered fairly or under controlled conditions and which was not job-related."[83] The remedies for these violations included back and front pay, attorneys fees, and placement in the next available vacant position in the section in which the plaintiff sought employment. The court made allowance for further testing of the plaintiff, but only if the new test could overcome the defects found in the earlier test and if other on-the-job accommodations were made available.

Conclusion

The legal sources that can be brought to bear to challenge the use of tests to make significant educational or employment decisions about handicapped persons are several. The major sources, in terms of specific regulations, are Section 504 and the EHA. However, relatively few suits have worked their way through the courts, and the proportion of plaintiffs who have prevailed has not been particularly high. The most active area of litigation thus far has been testing for special education placements: the results have been mixed. Based on the developing state of legal doctrine, at this point the only safe prediction is that more lawsuits will be forthcoming. The state of the law will depend, at least in part, on the state of the art or science of

testing. The level of effort and expertise in the testing profession has thus far not been sufficiently powerful or persuasive to have a significant impact on judges or quasijudicial decision-makers.

Footnotes

[1]29 U.S.C. Sec. 794.

[2]See, e.g., Cook and Laski, Beyond Davis: Equality of Opportunity for Higher Education for Disabled Students Under the Rehabilitation Act of 1973, 15 HARV. CIV. RTS.-CIV. LIB. REV. 415 (1980).

[3]"Physical or mental impairment" is defined as "(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 34 C.F.R. Sec. 104.3(j).

[4]Id. See Doe v. New York University, 666 F.2d 761, 775 (2d Cir. 1981) for a discussion of those with a record of impairment.

[5]21 U.S.C. Sec. 1400 et seq.

[6]34 C.F.R. Sec. 104.3(k)(1).

[7]34 C.F.R. Sec. 104.3(k)(2).

[8]34 C.F.R. Sec. 104.3(k)(3).

[9]34 C.F.R. Sec. 104.3(k)(4).

10442 U.S. 397 (1979).

[11]34 C.F.R. Sec. 104.4.

[12]34 C.F.R. Sec. 104.11. The Section 504 regulations cited throughout this text are those promulgated by the U.S. Department of

Education concerning educational programs and activities receiving federal financial assistance. Section 504, however, applies to all federally aided activities, and each relevant federal agency is to adopt its own set of regulations. In any agency conducting its own testing, particularly employment testing, or disbursing monies or aid to grantees or contractors, there must be a set of applicable federal 504 regulations. For example, the regulations of the U.S. Equal Employment Opportunities Commission require that an agency may not use an employment test when it:

> screens out or tends to screen out qualified handicapped persons or any class of handicapped persons unless: (1) the test score or other selection criterion, as used by the agency, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown...to be available. 29 C.F.R. Sec. 1613.705(a).

The same EEOC regulations also require that, when an examinee has a sensory manual, or speaking impairment that the test used must accurately reflect the examinee's ability to perform the jobs in question rather than reflecting the handicapping condition, unless the skills needed for the job are those affected by the handicap. 29 C.F.R. Sec. 1613.705(b).

[13] 34 C.F.R. Sec. 104.13(a).

[14] 34 C.F.R. Sec. 104.13(b).

[15] 34 C.F.R. Sec. 104.35(b).

[16] 34 C.F.R. Sec. 104.35(c).

[17] The validation of admissions tests presents a particular challenge when educational institutions offer accommodations in test

administration pursuant to Section 504 do not accurately assess the effects of these nonstandard administrations. A separate provision in the regulations indicates that the validity studies required here may "base prediction equations on first year grades, but shall conduct periodic validity studies against the criterion of overall success in the education program or activity in question in order to monitor the general validity of the test scores." 34 C.F.R. 104.42(d). This language is almost identical to that employed in Griggs v. Duke Power Co., 401 U.S. 424 (1971), where black job applicants challenged, under Title VII of the Civil Rights Act of 1964, the use of a high school diploma as an employment selection criterion for factory work when the requirement had a disproportionately impact on them. For an early application of Griggs standards to special education placements in the desegregation context, see Copeland v. School Board, 464 F.2d 932 (4th Cir. 1972).

[18]34 C.F.R. Sec. 104.42(b). A fourth requirement in this series prohibits preadmission inquiries as to whether an applicant is handicapped, except for affirmative action purposes. Id.

[19]34 C.F.R. Sec. 104.44(c).

[20]See, e.g., Sanders v. Marquette Pub. Schools, 561 F. Supp. 1361 (W.D. Mich. 1983). However, pursuant to the decision in Grove City College v. Bell, 465 U.S. 155 (1984), a showing of direct federal aid to the specific program in which the alleged discrimination occurred is necessary. A pending bill, the Civil Rights Restoration Act, would reverse this program specificity requirement.

[21]20 U.S.C. Sec. 1400 et seq.

[22]20 U.S.C. Sec. 1412(2)(c); 34 C.F.R. Sec. 300.500-.534.

[23]20 U.S.C. Sec. 1412(5)(c); 34 C.F.R. Sec. 532(a)(1).

[24]34 C.F.R. Sec. 300.532 (a)(2), 300.532(c), 300.530(b).

[25]34 C.F.R. Sec. 532.

[26]See, e.g., Board of Educ. v. Rowley, 458 U.S. 179 (1982); Board of Educ. v. Diamond, 808 F.2d 987, 992 (3d Cir. 1988).

[27]See, e.g., Bersoff, Regarding Psychologists Testily: Legal Regulation of Psychological Assessment in the Public Schools, 39 U. MD. L. REV. 27 (1979).

[28]42 U.S.C. Sec. 2000d.

[29]Special School Dist. of St. Louis County, EHLR 311:05 (OCR Mar. 27, 1978).

[30]Charleston R-1 School Dist., EHLR 257:359 (OCR Mar. 31, 1982). For the relevant multiple-source requirement, see supra note 16 and accompanying text.

[31]Georgia Dept. of Educ., EHLR 352:05 (OCR May 20, 1985); Walker County School Dist., EHLR 352:10 (OCR May 3, 1985).

[32]Thornton Township High School Dist., EHLR 311:85 (Oct. 30, 1986).

[33]See, e.g., Copeland v. School Bd., 464 F.2d 932, 934 (4th Cir. 1972); Hobson v. Hansen, 289 F. Supp. 401, 489 (D.D.C. 1967), aff'd sub nom Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1968).

[34]A largely parallel suit was filed in on behalf of Hispanic parents in Diane v. Board of Education, No. C-70-37 RFP (N.D. Cal 1969). This suit was resolved by a stipulated settlement approved by the court in 1973 under which the California Board of Education agreed to investigate any school district in which there was a significant overrepresentation

of Mexican American students in EMR classes, to collect relevant data, and to develop a plan to eliminate such disproportionate enrollments.

[35]Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1971).

[36]Larry P. v. Riles, 502 F.2d 963 (9th Cir. 1974).

[37]Larry P. v. Riles, 495 F. Supp. 926, 949-50 (N.D. Cal. 1979). The district court found no violations of California statutory law. Id. at 986 n.110.

[38]Id. at 933.

[39]Id. at 989.

[40]Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1986).

[41]See supra notes 15, 16, 24, 25 and accompanying text.

[42]See, e.g., Board of Education v. Harris, 444 U.S. 130 (1979); Debra P. v. Turlington, 744 F.2d 397, 407 (5th Cir. 1981).

[43]Larry P. v. Riles, EHLR 558:141 (N.D. Cal. 1986).

[44]Id. at 558:142. The controversy in California is not over. See Gold, Civil Rights Panel Investigating I.Q. Test Ban in California, Educ. Week, Oct. 28, 1987, at 10, col. 1.

[45]506 F. Supp. 831 (N.D. Ill. 1980). For a due process hearing session that tended toward the PASE view, see N.J. Case No. 83-1144; EHLR 505:277 (Hearing Officer Decision Dec. 23, 1983).

[46]520 F. Supp. 472 (S.D. Ga. 1981) modified as to other issues, 540 F. Supp. 701 (S.D. Ga. 1982), appeal dismissed sub nom Johnson v. Sikes, 730 F.2d 644 (11th Cir. 1984).

[47]456 F. Supp. 1211 (S.D.N.Y. 1978), vacated, 623 F.2d 248 (2d Cir. 1980), remand, 587 F. Supp. 1572 (S.D.N.Y. 1984).

[48]Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403 (11th Cir. 1985).

[49]Marshall v. Georgia, Civ. Action No. 482-233, slip op. at 128 (S.D. Ga. June 28, 1984).

[50]Id. at 131-48.

[51]468 U.S. 992 (1984).

[52]This exclusivity ruling was recently reversed by the Handicapped Children's Protection Act, 20 U.S.C. Sec. 1415(e)(4).

[53]775 F.2d at 416. This finding was not challenged by the plaintiffs on appeal. The court upheld the validity of achievement grouping techniques, distinguishing the education context from the employment context. Id. at 419. The appellate court also declined to decide which side had the burden to prove that ability grouping resulted from prior discrimination. See Vaughns v. Board of Education, 758 F.2d 983, 991 (4th Cir. 1985).

For the most recent ruling relative to achievement grouping in a desegregation context, without reference to handicapped students, see Montgomery v. Starkville Mun. Separate School Dist., 665 F. Supp. 487 (N.D. Miss. 1987).

[54]Specifically, the appellate court stated: "The total pool of students against which black children should have been measured is not the entire student body of the school district but the group of students who have been classified as EMR through a process not complying with the applicable regulations." Id. at 1421.

[55]The appellate court approved the district court's limitation of the IQ criterion to the standard error of measurement as recommended by

the American Association on Mental Deficiency. Id. at 1426. For a related ruling, see supra note 31 and accompanying text (Georgia Dept. of Educ.), wherein the Office of Civil Rights concluded that the revised eligibility criteria for mentally handicapped and hearing disabled classifications did not violate Sec. 504. The Eleventh Circuit also reversed the lower court's Section 504 ruling, holding that the futility of administrative exhaustion under the EHA allowed Section 504 relief not exceeding that available under the EHA.

[56]S-1 v. Turlington, EHLR 558:136 (S.D. Fla. 1986).

[57]AM. PSYCH. ASS'N., STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING (1985) (with the American Educational Research Association and the National Council on Measurement in Education). The section on "Testing People Who Have Handicapping Conditions" is at 77-80. The Standards have been used extensively in race-based challenges to employment testing.

[58]In the Debra P. deliberations, the trial court described "instructional validity" as "a subpart of content validity which together with curricular validity, insures that a test covers matters actually taught." 564 F. Supp. at 184. Psychometricians do not find such matters so simple. See, e.g., Yalow & Popham, Content Validity at the Crossroads, 12 EDUC. RESEARCHER 10 (Oct. 1983).

[59]One latent issue, for example, is that aspect of ability grouping where an IQ test is used as the sole criterion for placement in classes for the gifted and talented. In some states, where the test requirement causes a disproportionate underrepresentation of minority students, these same legal theories would appear to apply. See Zirkel & Stevens,

The Law Concerning Public Education of Gifted Students, 34 WEST'S EDUC. L. REP. 353, 356 (1986). The case law thus far in situations involving gifted/talented issues has been limited to nonminority plaintiffs. See, e.g., Roe v. Commonwealth, 638 F. Supp. 929 (E.D. Pa. 1986), aff'd mem., 813 F.2d 398 (3d Cir. 1987), cert. denied, --- U.S. --- (1987); Doe v. Commonwealth, 593 F. Supp. 54 (E.D. Pa. 1984). The area would appear to be fertile for a suit by minority plaintiffs in a state, like Pennsylvania, that relies virtually entirely on standardized IQ test scores as the criterion for placement in gifted education.

[60] See, e.g., Washington Cent. Supervisory Union No. 32, EHLR 257:509 (OCR Feb. 24, 1984); Rochester School Dist., EHLR 311:09 (OCR Jan. 29, 1980); see also New York Case No. 11344 (SEA Appeal Decision Oct. 22, 1984); Mass. Case No. 86-0705 (Hearing Officer Decision July 28, 1980).

[61] See, e.g., Hawaii State Dept. of Educ., EHLR 311:52 (Sept. 17, 1985); Coachella Valley Unified School Dist., EHLR 311:42 (May 14, 1985); Dawson Indep. School Dist., EHLR 257:603 (OCR Nov. 14, 1984); Dysart Unified School Dist., EHLR 311:32 (OCR Oct. 6, 1983); cf. New York Case No. 11427, EHLR 507:136 (SEA Appeal Decision Mar. 13, 1985).

[62] See, e.g., Township High School Dist. No. 211 (OCR Oct. 28, 1986); Hershey Pub. School Dist., EHLR 257:404 (OCR Oct. 29, 1982); Special Educ. Dist. of Lake County, EHLR 257:34 (OCR June 21, 1979).

[63] See, e.g., Perth Amboy School Dist., EHLR 258:65 (OCR Aug. 14, 1985); North Star Borough School Dist., EHLR 257:140 (OCR Apr. 18, 1980).

[64]See, e.g., Inquiry by Gail Gray, EHLR 211:447 (OCR Apr. 1, 1987); Inquiry by Woody Houseman, EHLR 305:54 (OCR Apr. 3, 1986); Inquiry by Bob Caruso, EHLR 211:101 (Oct. 5, 1979).

[65]Healy v. Ambach, 481 N.Y.S.2d 809 (App. Div. 1984).

[66]Hudson v. Wilson, EHLR 558:186, 558:189 (W.D. Va. Dec. 15, 1986).

[67]Carroll v. Capalbo, 563 F. Supp. 1053, 1056-59 (D.R.I. 1983); Rettig v. Kent City School Dist., 539 F. Supp. 768, 782 (N.D. Ohio 1981), aff'd in part, 720 F.2d 463 (6th Cir. 1983), app. dismissed, 467 U.S. 1201 (1984), app. on remand, 788 F.2d 328 (6th Cir. 1986), cert. denied, 106 S. Ct. 3297 (1986). In the Rettig case, the lower court also rejected a per se rule against the use of standardized tests as part of a multifactor evaluation of an autistic child. 539 F. Supp. at 783. The immediate appeal provided some support. 720 F.2d at 466 n.2. The main focus, however, became extracurricular activities.

[68]Pipho & Hadley, "State Activity - Minimum Competency Testing", CLEARINGHOUSE NOTES (Education Commission of the States, 1984).

[69]See, e.g., Brookhart v. Peoria School Dist., 697 F.2d 179 (7th Cir. 1983); Board of Educ. of Northport-East Northport v. Ambach, 469 N.Y.S.2d 669 (1983), cert. denied, 465 U.S. 1101 (1984); Anderson v. Banks, 520 F. Supp. 472 (S.D.Ga. 1981), modified, 540 F. Supp. 761 (S.D. Ga. 1982), aff'd sub nom Johnson v. Sikes, 730 F.2d 644 (11th Cir. 1984). Earlier rulings by OCR, which were preempted by these court decisions, relied on the regulations requiring specific validation. See, e.g., Peoria Pub. School Dist., EHLR 257:135 (OCR Apr. 18, 1980); Inquiry of Bion Gregory, EHLR 211:206 (OCR Oct. 11, 1979).

[70]697 F.2d at 184.

[71] Id. at 187.

[72] Jackson County Schools, EHLR 257:324 (OCR 1981).

[73] A. RAGOSTA, STUDENTS WITH DISABILITIES: FOUR YEARS OF DATA FROM SPECIAL TEST ADMINISTRATIONS OF THE SCHOLASTIC APTITUDE TEST, 1980-83 1-3 (1987).

[74] Chicago Bd. of Educ., EHLR 257:515, 257:517 (OCR Apr. 20, 1984).

[75] Ragosta, supra note 72, at 3.

[76] OSPR Policy Mem. No. I-2-26 (OCR July 5, 1979).

[77] 694 F.2d 666 (5th Cir. 1983).

[78] Id. at 669.

[79] Id. at 669 n.3.

[80] The full title of the GATB is "USES General Aptitude Test Battery"; the test is published by USES, the United States Employment Service. The next entry in the alphabetical listings in Buros' Eighth Mental Measurements Yearbook, an exhaustive list of all standardized tests published in the nation, is "USES Nonreading Aptitude Test Battery." Any Master's degree candidate in applied psychology, for example, should be familiar with "Buros." One may only speculate why this litigation failed to address the existence of this adaptation of the test, particularly when it appears that the plaintiff was subjected to an independent evaluation of some sort. The Buros review of the nonreading version of the test indicates that there are no validity data available for the test and that the general GATB norms were used for the adaptation; this simulation, which is not discussed in the Fifth Circuit decision, might explain the failure to utilize the adaptation. See MENTAL MEASUREMENTS YEARBOOK 675-80 (O. Buros ed. 1978).

[81]617 F. Supp. 156 (D.D.C. 1985).

[82]Crane v. Lewis, 551 F. Supp. 27 (D.D.C. 1982).

[83]617 F. Supp. at 162.

TESTING THE HANDICAPPED: LEGISLATION, REGULATIONS AND LITIGATION

Diana Pullin and Perry A. Zirkel

Abstract

There are several potentially powerful legal tools that can be brought to bear in challenges to the use of tests to make significant educational or employment decisions about handicapped persons. The major sources of legal protections for the handicapped in these areas are two federal laws, Section 504 of the Rehabilitation Act of 1973 and the Education of the Handicapped Act (EHA).

The Section 504 regulations provide a wide definition of handicap and include a vast array of requirements for testing in preschool, elementary/secondary, and postsecondary education settings and in employment. The EHA is specific to students in elementary/secondary education, but its testing requirements and procedural safeguards are detailed and extensive.

The largest cluster of testing cases has focused on alleged racial discrimination in special education placements. These special race-related cases vary from the well-publicized Larry P. litigation, which reached the federal appellate level, to little known administrative rulings by the Office of Civil Rights. The results have been mixed. This case law is as notable for what is not covered as for what is covered. First, the judges deciding the cases did not mention, much less rely upon, the APA Standards for benchmarks, or even guidance, in resolving the disputes before them. Second, there is not, other than in the trial court opinions in Larry P., a significant amount of discussion

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of such psychometric issues as validity and reliability. Third, there is significant room for further litigation on the use of standardized testing to determine special (and regular) education placements.

Approximately half the states, and a number of local school districts in other states, require that students obtain a passing score on a minimum competency test in order to receive a regular high school diploma. The three relevant court decisions uniformly held that the use of minimum competency tests to determine the award of regular high school diplomas to students with handicaps is not per se unconstitutional nor a per se violation of the federal statutes concerning education of the handicapped. Additionally, students who would have otherwise met all of the previous requirements for the receipt of a regular high school diploma may be denied a diploma when a new testing requirement is implemented without creating violations of Section 504 so long as there are sufficient accommodations in the administration of the test. However, there must be adequate notice to allow sufficient coverage of the skills and knowledge covered on the test in a handicapped student's IEP or for the parents and teachers to make an informed decision that the IEP not be geared to the test.

While there have been about 15,000 handicapped students who have taken the Scholastic Aptitude Test in the past four years and a growing number of handicapped students who now seek access to higher education, there have been no court decisions to date on the SAT, ACT or other postsecondary educational testing, and the rulings from the Office of Civil Rights have been negligible.

The considerable number of cases addressing issues of race discrimination in employment testing and the often highly sophisticated

judicial analyses of psychometric issues in those cases has not been duplicated in the area of discrimination on the basis of handicap. Indeed, there have been only a few legal challenges to employment testing on behalf of handicapped workers. Although these cases have arisen in other employment contexts, they have direct applications to employment in the education sector.

In sum, relatively few suits have worked their way through the courts, and the proportion of plaintiffs that have prevailed has not been particularly high. Based on the developing state of legal doctrine, at this point the only safe prediction is that more lawsuits will be forthcoming. The state of the law will depend, at least in part, on the state of the art or science of testing. The level of effort and expertise in the testing profession has thus far not been sufficiently powerful or persuasive to have a statistically significant impact.